SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 240.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

TOMMY PAYNE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Names and Addresses of Counsel.

THOS. P. REVELLE,
U. S. District Attorney,
Federal Building, Seattle, Washington,
W. W. MOUNT,
Assistant U. S. Attorney,
Federal Building, Tacoma, Washington,
Attorneys for Appellant.
ARTHUR E. GRIFFIN,
1219–21 Alaska Building, Seattle, Washington,
ARTHUR R. GRIFFIN,
1219–21 Alaska Building, Seattle, Washington,
Attorneys for Appellee. [1*]

In the United States District Court, for the Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Bill of Complaint—Petition.

To the Honorable Judges of the Above-entitled Court, Sitting in Equity.

The plaintiff complains of the defendant and for cause of action alleges and says:

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*Page-number appearing at foot of page of original certified Transcript of Record.

I.

That the plaintiff is and at all times since his birth has been a full blood Indian, residing upon the Quileute Reservation in this District, and a member of the Quileute Tribe of Indians.

II.

That the grounds upon which the court's jurisdiction depends are as follows: That the plaintiff is a full blood Quileute Indian and a member of the Quileute Tribe of Indians, born and residing upon the Quileute Reservation in this District. That the plaintiff is entitled under the treaty made and entered into between the United States and the Quileute Indians and other bands of Indians, and under the Allotting Acts of the United States to an allotment of at least 80 acres of land upon the Quinaielt Reservation in the State of Washington, and within this District. The jurisdiction of the court further depends upon the acts of August 15, 1894, 28 Statutes at Large 305, and is amended by the [2] act of February 6, 1901, 31 Statutes at Large 760, giving the right to Indians to bring suits against the United States to establish their rights to an allotment of land.

III.

That plaintiff is the head of the family consisting of the plaintiff's wife and three children.

IV.

That about nine years ago the plaintiff duly selected for allotment with the assistance and approval of the then allotting agent of defendant for

said Quinaielt Reservation, the following described land as his allotment, described as follows, to wit:

> M. 45, The West one-half (½) of the Northwest quarter (¼) of Section 26, Township 23, North of range 13 W., containing 80 acres, the same being a portion of the Quinaielt Reservation, within the District of Washington.

and that ever since said land was so selected by plaintiff, the plaintiff is informed and believes, that the same has been held for the plaintiff, and that all other persons and Indians have been excluded therefrom.

V.

That the land described is unalotted, unimproved, vacant, Indian lands subject to selection and allotment, under the laws of the United States and plaintiff is lawfully entitled to have said land allotted to him.

VII.

Notwithstanding all of the facts hereinbefore alleged the defendant, its officers and agents have wrongfully failed, neglected and refused to allot the said land to the plaintiff or to issue to the plaintiff any trust or fee patent therefor, and have denied and excluded and still deny and exclude plaintiff from [3] said land and have refused and still refuse to let plaintiff go upon or reside upon said land or any portion thereof.

VII.

That plaintiff is entitled to have said land so selected allotted to him and desires that the same be allotted to him and that his rights be recognized and

that he be permitted to go upon, live upon, cultivate and improve said land as his home.

VIII.

That plaintiff waives answer under oath.

WHEREFORE, plaintiff prays judgment as follows:

1. That a judgment and decree be entered herein as provided by law in favor of this claimant to said 80 acres of the said land hereinbefore described, and that said decree be properly certified by the Secretary of the Interior, and that the plaintiff be awarded said lands as his allotment and that he be adjudged and decreed to have full right, power and authority to go upon, live upon, cultivate and improve the said land as his home in all respects as provided by law.

2. That the plaintiff have all other and further relief as is equitable and just.

GRIFFIN & GRIFFIN,
Attorneys for Plaintiff. [4]

State of Washington,
County of King,—ss.

Tommy Payne, being first duly sworn, upon oath deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing petition, knows the contents thereof and the same is true as he verily believes.

[Thumb print] TOMMY PAYNE.

Subscribed and sworn to before me this 2d day of October, 1920.

[Notary Seal] ARTHUR E. GRIFFIN,
Notary Public in and for the State of Washington,
Residing at Seattle, Washington.

[Indorsed]: Filed in the United States District Court Western District of Washington, Southern Division. Oct. 29, 1920. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [5]

United States District Court Western District of Washington, Southern Division.

No. 111-E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Answer.

To the Honorable Edward E. Cushman, Judge of the Above-entitled Court, Sitting in Equity:

Comes now the above-named defendant, the United States of America, by Robt. C. Saunders, United States Attorney, for the Western District of Washington, and in answer to the petition of the plaintiff, Tommy Payne, in the above-entitled cause admits, denies and alleges as follows:

I.

Answering paragraphs I, II and III of said pe-

tition, this defendant, for lack of knowledge, information or belief as to the matters and things therein contained, denies the same and each and every allegation thereof.

II.

Answering paragraph IV of said petition, this defendant denies the same and each and every allegation thereof and alleges the facts to be that the land mentioned and described in said petition is not such land as is or would be available for agricultural or grazing purposes, but is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes. [6]

III.

Answering paragraph VI of said petition this defendant denies the same and each and every allegation thereof, and alleges the facts to be that the said defendant rightfully refused to allot the said land to the plaintiff, or to issue to the plaintiff any trust or fee patent therefor, and has denied and excluded, and still denies and excludes the plaintiff from said land, and has refused and still refuses to let plaintiff go upon, or reside upon, said land, or any portion thereof.

IV.

Answering paragraph VII of said petition, this defendant denies the sam*d* and each and every allegation thereof.

WHEREFORE, this defendant prays that the plaintiff go hence, and that the defendant have judgment for its costs and disbursements, and for

such other and further relief as to this Honorable Court may appear just and equitable.

ROBT. C. SAUNDERS,
United States Attorney.
J. M. BOYLE, Jr.,
Assistant United States Attorney.

Received a copy of the within Answer this 28th day of March, 1921.

GRIFFIN & GRIFFIN,
Attorneys for Pltf.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 29, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [7]

In the United States District Court for the Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Demurrer.

Comes now the plaintiff and demurs to the affirmative matter set forth and contained in the defendant's answer, for the reason and upon the ground that said affirmative matter in said answer does not state facts sufficient to constitute a defense,

and does not state facts sufficient to prevent the plaintiff from having and recovering the relief set forth and demanded in his complaint and petition herein.

GRIFFIN & GRIFFIN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. July 15, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [8]

In the District Court of the United States Western District of Washington, Southern Division.

No. 111-E—IN EQUITY.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Filed: July 28, 1921.
GRIFFIN & GRIFFIN,
For Plaintiff,
Hon. ROBT. C. SAUNDERS,
United States Attorney,
Hon. J. M. BOYLE, Jr.,
Asst. United States Attorney,
For Defendant.

CUSHMAN, District Judge—Under the Act of August 15, 1894, (28 Stats. at L. Chap. 290, page

305,) as amended by the Act of February 6, 1901, (31 Stats. at L., chap. 217, page 760) (Comp. Stats. 4214), plaintiff, a full blooded Indian of the Quileute Tribe, the head of a family consisting of a wife and three children, sues for an allotment of eighty acres of land in the Quinaielt Reservation, which he alleges he selected nine years ago with the assistance and approval of the then allotting agent.

The defendant has answered, alleging, among other things:

> " * * * that the land mentioned and described in said petition is not such land as is or would be available for agricultural or grazing purposes, but is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes."

A demurrer has been interposed to this defense by the plaintiff. [9]

The treaty with the Quileute and Quinaielt Indians, made July 1, 1855, provides:

> "Article 5. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to *clear*, fence, and break up a sufficient quantity of land for cultivation, the United States further agrees to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

"Article 6. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor." (12 Stats. 971.)

Article VI of the treaty with the Omahas, concluded at Washington City, March 6, 1854, above referred to, provides:

"The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in Article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one-quarter section; to each family of three and not exceeding five, one-half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one-quarter section for every additional five members * * * (10 Stats. 1043). [10]

The Court will take judicial notice of the fact that the Quinaielt Reservation was at the time of the treaty and its establishment, a timbered area, and, save as since cleared, so remains. It is to be noted that Article V of the treaty with the Quileutes appropriated $2500 to be expended, in part, to "clear" land upon it for cultivation. This must have contemplated clearing it of timber.

Section 1 of the allotment act of February 8, 1887, as amended, provides:

"In all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by

> treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof, to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. * * * (Sec. 4195 Comp. Stats.)

If the act is necessarily inconsistent with the treaty, it, to that extent, supersedes the treaty; but it is the duty of the Court to give full effect to both where it can reasonably be done. This is true in the case of statutes and, for stronger reasons, it must be true where a modification of a treaty is claimed to have been effected by a later statute, for a treaty is *quasi* contractual in its nature. Citation of authority upon these propositions is deemed unnecessary.

By this section, the discretion of the President or Secretary in the particular in question is limited to determining, before surveying a reservation or a part of it, that it "may be advantageously utilized for agricultural or grazing purposes by [11] such Indians." It is not claimed that the Reservation has not been surveyed, and from the complaint it

would appear that the portion of it now in question had been.

The right given the President and the duty outlined are controlled by the character of the land to be surveyed. The discretion vested in the President of allotting to the individual Indian lands "in such area as, in his opinion may be for their best advantage, not to exceed 80 acres, etc.," contemplates a discretion in determining the amounts to be allotted and places the limit on such amount, which is less than that provided by the treaty. While the foregoing authority is given the President to consider and determine the character of the land in fixing the size of the allotment, no right is given by this section to refuse an allotment of selected, surveyed land because the lands are more valuable for timber than agriculture or grazing.

In United States vs. Fairbanks (171 Fed. 337) the Circuit Court of Appeals of the Eighth Circuit in considering this provision, said:

> "the acts of 1887 and 1889 were confined to lands that were 'advantageous for agricultural and grazing purposes.' The department, in construing this language, ruled that lands which were chiefly valuable for the pine timber growing thereon, did not come within the statute. Such lands had therefore been excluded from allotment. The Steenerson act abrogated this limitation. The agent was not aware of this feature of the Steenerson act, and for that reason held that the Mooers application for the lands in question were valid, and permitted the second

filing. The trial court was also of the opinion that, inasmuch as the Steenerson act first gave a right to the allotment of pine lands all persons claiming such allotments should be treated alike, and that no allotment of such lands be made until the agency was ready to begin the work of making additional allotments under the Steenerson act. We think this ruling was erroneous. The regulation of the department excluding timber lands from the benefit of the statutes of 1887 and 1889 was itself questionable. A very [12] large portion of the area of the United States at the present time developed to agriculture was originally timber land. * * *

(Act p. 340)

Leecy vs. United States, 190 Fed. 289.

The Fairbanks case was affirmed by the Supreme Court (223 U. S. 315) without discussing the particular question here involved. The Steenerson act, spoken of by the courts has no application to the lands now in question.

The demurrer to this defense is sustained; but, on account of the broad denials of the answer, the demurrer to the answer as a whole is overruled.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 20, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [13]

In the District Court of the United States, Western District of Washington, Southern Division.

No. 111-E—IN EQUITY.

TOMMY PAYNE,

Complainant,

vs.

UNITED STATES OF AMERICA,

Defendant.

Memorandum Decision on the Merits.

Filed: January 19, 1922.

GRIFFIN & GRIFFIN,
For Complainant,
Hon. THOS. P. REVELLE,
U. S. District Attorney,
Hon. W. W. MOUNT,
Assistant District Attorney,
For Defendant.

CUSHMAN, D. J.—The evidence taken and the arguments, oral and written, but confirmed my belief in the correctness of the ruling herein made upon the demurrer to the answer.

In 1885, the lands here in question, with other lands, were reserved for the Indians of the Quinaielt and Quileute Tribes, with provision and promise made for their allotment. The Indians were, in effect, told that the Government thought it best to allot the lands in severalty that they might have homes and better learn to cultivate the soil.

To carry out this beneficent purpose, in exchange for a vast and rich heritage of lands released by the Indians, the Government reserved for them a small parcel of land in a remote wilderness. It was covered with timber, which was then valueless. [14] The land, itself, was not rich, but rough, stony and of a light soil at the best. The timber being of no value, and the lands of little worth, there was no way to defray the expense of clearing the land, which, with timber such as that upon the land, is very heavy.

The opportunity of taking fish from the ocean, afforded by the location, was, probably, all that enabled the Indians to exist near this "cod's head" that had been so generously given them for the "salmon's tail."

Now, after nearly seventy years, when all who heard Governor Stevens make these promises are dead, because, forsooth, the timber on an allotment has become of sufficient value to enable the descendants of the credulous ones, who listened to those ancient tales, to pay for the clearing of the lands and the making of some kind of a home thereon, the fact that the timber has become more valuable than the lands is made the excuse for a refusal to carry out that old promise. It is said the timber on this claimed allotment is worth $3900. In seventy years, $4,000 would be produced by less than $500 at six per cent, compounded annually.

The Government's evidence shows that:

> "there are but a very few allotments (already made) on this reservation on which the timber

value is not greatly in excess of any value that can be credited to the land, and generally in these few cases the factors that made for a low timber value would also serve to make the land of but very little value."

No explanation is given of why allotments should have been made to the Quinaielt Indians, under substantially the same conditions, and allotments refused the plaintiff and other Quileutes.

Decree is for complainant as prayed. [15]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 20, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [16]

In the United States District Court, for the Western District of Washington, Southern Division.

No. 111-E

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Decree.

This cause came duly and regularly on to be heard in open court before Honorable Edward E. Cushman, one of the Judges of the above-entitled court upon the motion of the plaintiff for a decree upon the findings of fact and conclusions of law

heretofore made and entered herein, and the Court being fully advised, grants said motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT, That the plaintiff, Tommy Payne, be and he hereby is entitled to the lands heretofore selected by said plaintiff, situated upon the Quinaielt Indian Reservation, within this District, in the State of Washington, to wit: The West One-Half (W½) of the Northwest Quarter (NW ¼) of Section 26, Township 23 North of Range 13 West of Willamette Meridian, containing 80 acres, more or less, and being the portion of the said Quinaielt Reservation, as an allotment to be owned and held by the said plaintiff, in all respects as provided by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the defendant, its officers and agents, be and they hereby are ordered and directed to issue to said plaintiff a certificate of allotment for said lands hereinbefore described, said certificate of allotment to be in effect and to award to the said plaintiff all of the rights to which said plaintiff is entitled under and by virtue of the laws of the United States. [17]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT, That the defendant, its officers and agents, and all persons claiming by, through or under them, be and they hereby are forever barred and estopped from ever claiming or asserting that said plaintiff, his heirs, executors, administrators, and assigns, are not entitled to said lands, as and for his allotment, with

full right to use, build upon, clear, improve and occupy the same, in all respects as provided by law.

Done in open court this 26th day of Jan. A. D., 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 27, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [18]

In the United States District Court, for the Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Findings of Fact and Conclusions of Law.

This cause came duly and regularly on to be heard in open court before Honorable Edward E. Cushman, one of the Judges of the above-entitled court. The plaintiff appeared in person and by Arthur E. Griffin, his attorney, and the defendant appeared by Thomas P. Revelle, District Attorney, and W. W. Mount, Assistant District Attorney. Evidence was duly and regularly introduced for

and on behalf of the plaintiff and defendant, and the Court being fully advised, makes the following

FINDINGS OF FACT.

I.

That the plaintiff now is and at all times since his birth has been a full blooded Indian, residing upon the Quilleute Reservation in this District, and a member of the Quilleute Tribe of Indians.

II.

That the grounds upon which the court's jurisdiction depends are as follows: That the plaintiff is a full blood Quilleute Indian and a member of the Quilleute Tribe of Indians, born and residing upon the Quilleute Reservation of this District. That the plaintiff is entitled under the treaty made and entered into between the United States and the Quilleute Indians and other bands of Indians, and under the Allotment Acts of the United States to an allotment [19] of at least 80 acres of land upon the Quinaielt Reservation in the State of Washington, and within this District. The jurisdiction of the court further depends upon the acts of August 15, 1894, 28 Statutes at Large 305, and is amended by the act of February 6, 1901, 31 Statutes at Large 760, giving the right to Indians to bring suit against the United States to establish their rights to an allotment of land.

III.

That plaintiff is the head of the family consisting of the plaintiff's wife and three children.

IV.

That about ten years ago the plaintiff duly se-

lected for allotment with the assistance and approval of the then allotting agent of defendant for said Quinaielt Reservation, the following described land as his allotments, described as follows, to wit:

> M. 45, The West one-half (½) of the Northwest Quarter (¼) of Section 26, Township 23, North of Range 13 W., containing 80 acres, the same being a portion of the Quinaielt Reservation, within the District of Washington.

and that ever since said land was so selected by plaintiff, the plaintiff is informed and believes, that the same has been held for the plaintiff, and that all other persons and Indians have been excluded therefrom, and plaintiff desires to go upon said land with himself and family, and to clear the same, and to make his home upon said land so selected.

V.

That the land described is unallotted, unimproved, vacant, Indian lands subject to selection and allotment, under the laws of the United States and plaintiff is lawfully entitled to have said land allotted to him.

VI.

Notwithstanding all of the facts hereinbefore alleged the defendant, its officers and agents have wrongfully failed, neglected and refused to allot the said land to the plaintiff or to issue to [20] the plaintiff any trust or fee patent therefor, and have denied and excluded and still deny and exclude plaintiff from said land, and have refused and still re-

fuse to let plaintiff go upon or reside upon said land or any portion thereof.

Done in open court this 26th day of Jan., A. D. 1922.

EDWARD E. CUSHMAN,
Judge.

And from the foregoing findings of fact, the Court makes the following

CONCLUSIONS OF LAW.

I.

That the plaintiff is entitled to a decree herein adjudging and decreeing that the plaintiff duly selected the lands described in paragraph 4 of the plaintiff's Petition, and is entitled to a Decree adjudging and decreeing that said plaintiff is entitled to said land so described, and all portions thereof, for his allotment, and is entitled to have said land allotted to him by the defendant, its officers and agents.

II.

That the plaintiff is entitled to the immediate possession of said lands, and is entitled to go upon the same with himself and his family, and to build, clear, and improve said lands, and to use the same and all parts thereof for his home for himself and said family, and is entitled to all the rights guaranteed to said plaintiff and the Indians of his said Tribe by the treaty made and entered into by the United States and said Quilleute Tribe and Band of Indians.

III.

That the plaintiff is entitled to a decree estopping

the defendant, its officers and agents from hereafter interfering with the plaintiff in his right to the possession of said lands and his [21] right to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiff is not entitled to go upon, clear, improve and build upon said land.

Done in open court this 26th day of Jan., A. D. 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 27, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [22]

United States District Court, Western District of Washington, Southern Division.

No. 111–E—IN EQUITY.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Defendant's Exceptions.

Comes now the above named defendant, United States of America, by its attorneys, Thomas P. Revelle and W. W. Mount, and respectfully excepts

to the decree heretofore made and entered by the Court in the above-entitled cause.

This exception is based upon the ground and for the reason that the property described in the plaintiff's bill of complaint and selected by the plaintiff for allotment is not such land as is suitable for agricultural or grazing purposes as provided by the statute, but on the contrary is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes.

THOMAS P. REVELLE,
United States Attorney,
W. W. MOUNT,
Assistant United States Attorney.

The foregoing exception is hereby allowed this 17th day of May, A. D., 1922.

EDWARD E. CUSHMAN,
United States District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 18, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [23]

United States District Court Western District of Washington Southern Division.

No. 111–E—In EQUITY.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Petition and Appeal.

Comes now the above-named defendant, the United States of America, through its attorneys, Thos. P. Revelle and W. W. Mount, feeling itself aggrieved does hereby appeal from the judgment and decree signed and entered in the foregoing cause on the 19th day of January 1922 in the District Court of the United States for the Western District of Washington, Southern Division, and from each and every part thereof and does herewith present its several assignments of error and does hereby pray the allowance of said appeal and that so much and such portions of the record, the statement of facts and exhibits as may be necessary to execute said appeal be forwarded from said Court by the Clerk of the District Court of the United States for the Southern Division of the Western District of Washington, duly certified and authen-

ticated under the seal of the said trial Court to the Circuit Court of Appeals for the Ninth Circuit.

THOS. P. REVELLE,
United States Attorney,
W. W. MOUNT,
Assistant United States Attorney.

Due receipt of a copy of the foregoing Petition and Appeal is hereby acknowledged this 16th day of May, 1922.

GRIFFIN & GRIFFIN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court Western District of Washington Southern Division May 17, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [24]

United States District Court Western District of Washington Southern Division.

No. 111-E—In EQUITY.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Assignments of Error.

Comes now the above-named defendant, the United States of America, by and through its attorneys, Thos. P. Revelle and W. W. Mount, and re-

spectfully submits the following assignments of error upon which it relies as supporting its appeal from the Judgment and Decree entered on the 19th day of January 1922 in said cause in the District Court of the United States for the Southern Division of the Western District of Washington and under which assignments of error said appellant seeks reversal of the Decision, Judgment and Decree of said trial Court:

I.

That the District Court erred in sustaining the plaintiff's demurrer to that portion of the defendant's answer alleging that the land mentioned and described in the plaintiff's petition was not such land as is or would be available for agricultural or grazing purposes but on the contrary is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes.

II.

That the District Court erred in finding that the land selected for allotment by the plaintiff, Tommy Payne, was subject to selection and allotment under the laws of the United States [25] and that the plaintiff is lawfully entitled to have such land allotted to him.

III.

That the District Court erred in finding that the officers and agents of the United States of America have wrongfully failed, neglected and refused to allot the said land to the plaintiff or to issue to the

plaintiff any trust or fee patent therefor.

IV.

That the District Court erred in adjudging that the plaintiff was entitled to a decree adjudging and decreeing that the said plaintiff, Tommy Payne, is entitled to the land selected for his allotment and that the plaintiff is entitled to have said land allotted to him by the defendant, its officers and agents.

V.

That the District Court erred in concluding that the plaintiff is entitled to the immediate possession of said lands and is entitled to go upon the same with himself and his family, and to build, clear, and improve said lands, and to use the same and all parts thereof for his home for himself and said family, and is entitled to all the rights guaranteed to said plaintiff and the Indians of his said Tribe by the Treaty made and entered into by the United States and Said Quilleute Tribe and Band of Indians. [26]

VI.

That the District Court erred in concluding that the plaintiff is entitled to a decree estopping the defendant, its officers and agents from hereafter interfering with the plaintiff in his rights to the possession of said lands and his right to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiff is not

entitled to go upon, clear, improve and build upon said land.

THOS. P. REVELLE,
United States Attorney,
W. W. MOUNT,
Assistant United States Attorney,
Attorneys for Defendant.

Due receipt of copy of the foregoing assignments of error is hereby acknowledged this 16th day of May 1922.

GRIFFIN & GRIFFIN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court Western District of Washington, Southern Division. May 17, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [27]

United States District Court Western District of Washington Southern Division.

No. 111-E—In EQUITY.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Allowing Appeal.

BE IT REMEMBERED that this matter came on duly for hearing on the petition of the United

States, through its attorneys, Thos. P. Revelle, and W. W. Mount, for the allowance of its petition in appeal in the foregoing entitled cause from the decision of this Court made and entered on the 19th day of January, 1922, and the said appeal being from said Decision to the Circuit Court of the United States of America for the Ninth Circuit; and this Court being fully advised in the premises.

IT IS HEREBY ORDERED that the said appeal be allowed as prayed for and the Clerk of this Court is hereby directed to formulate a true copy of the transcript of the records and proceedings to the extent necessary to properly present said appeal together with exhibits and other matters of record and the memorandum decision and formal Decree of this Court, all duly authenticated, and send same to the said Circuit Court of Appeals for the Ninth Circuit.

Done in open Court this 16th day of May 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 17, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [28]

United States District Court Western District of Washington Southern Division.

No. 111–E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Extending Time to March 20, 1922, to File Bill of Exceptions.

This matter coming on to be heard before the Honorable Edward E. Cushman, Judge of the above-entitled court, on motion of the above-named defendant, the United States of America, by Thos. P. Revelle, United States Attorney for the Western District of Washington, for an order extending the time within which to file a bill of exceptions in the above-entitled case for a period of sixty days from the nineteenth day of January, 1922, and the Court being fully advised in the premises, now therefore.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant be allowed until the twentieth day of March, 1922, in which to file a bill of exceptions in the above-entitled cause.

Done in open Court this 30th day of January, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States of America Western District of Washington, Southern Division. Jan. 30, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [29]

United States District Court Western District of Washington Southern Division.

No. 111-E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Extending Time to May 19, 1922, to File Bill of Exceptions.

This matter coming on to be heard before the Honorable Edward E. Cushman, Judge of the above-entitled court, on motion of the above-named defendant, the United States of America, by Thos. P. Revelle, United States Attorney for the Western District of Washington, for an order further extending the time within which to file a bill of exceptions in the above-entitled case for a period of sixty days from the twentieth day of March, 1922, and the Court being fully advised in the premises, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant be allowed

until the nineteenth day of May, 1922, in which to file a bill of exceptions in the above-entitled cause.

Done in open Court this 16th day of March, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court Western District of Washington Southern Division, Mar. 16, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin Deputy. [30]

In the United States District Court, for the Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,
Plaintiff

vs.

UNITED STATES OF AMERICA,
Defendant.

Plaintiff's Proposed Statement of Evidence.

Comes now the above-named plaintiff and respondent by Arthur E. Griffin, his attorney, and submits the following as a true and complete statement of all the evidence essential to the decision of the questions presented by the appeal of the defendant and appellant, from the decree entered herein against the defendant and in favor of the plaintiff:

Testimony of Tommy Payne, for Plaintiff.

TOMMY PAYNE testified that he is a full blooded Indian of the Quileute Tribe, born and raised on the Quileute Reservation, and now fifty-five years of age. He has a family consisting of a wife and five children.

That the Quileute Reservation is about one mile square, and about two hundred Indians live on it. The village on the reservation is called La Push. The Indian name of his father was Tah-ah-ha-wht'l, who was the same man who signed the treaty for the Quinaielt and Quileute Indians with Governor Stevens, July 1st, 1855.

That the Quinaielt Reservation was surveyed about twelve years ago, at which time he selected on this Reservation an eighty acre tract of land for allotment, more particularly described as follows:

> "M. 45. The West one-half (W ½) of the Northwest quarter (NW ¼) of Section 26, Township 23 North of range 13W.; containing 80 acres, the same being a portion of the Quinaielt Reservation, within the District of Washington."

This selection was made through Mr. Archer, at that time the allotting agent for the Government. Mr. Archer [31] instructed his assistant to go and see the plaintiff together with the rest of the people that were entitled to an allotment at that time, and they showed plaintiff maps and locations of where there was good lands for agricultural purposes; that is howe he got this. They took his

(Testimony of Tommy Payne.)

name and it is recorded with the land that he selected there. That it is the desire and intention of the plaintiff to go upon that land and make it his home as soon as he is permitted to do so by the government officials. The land selected is part of the Quinaielt Reservation in this State.

Concerning the character of the land selected, the plaintiff testified that about half the land is heavily timbered with cedar and hemlock, and the remainder bottom land with clay soil. The character of the land is very similar to all the lands along the Raft and Queets River, which is mostly bottom land, clay soil. Part of the land is open along that bottom. That if the timber were removed it would make good agricultural land. That it is necessary now that the Indians should have agricultural lands in order to support their families because they are having a hard time to support their families on account of their fish getting played out, and the seal hunting getting very poor and all other things along the river where they used to make their living has gotten so that they are restricted from getting the fish and making their living, which is why it is necessary for them to all move over to their allotment if they are given their right. That the plaintiff has supported his family on fishing and sealing and hunting, but those things are all played out, and in a few years they do not not know what they are going to do. That the Indians used to hunt sea otter years ago, but that is all gone. These big purse seine com-

(Testimony of Tommy Payne.)

panies have gotten so thick now that the Indians' fish that used to be in the water are pretty [32] nearly all destroyed, and the white people have fished out the Quileute River that runs down by their reservation.

That plaintiff feels sure he can support his family if given the right to that land; that both white people and Indians along the Queets River are making a good living to-day out of their farms along the river, and the Queets River is about six miles from the land plaintiff selected, and also the Raft River. Indian canoes can go in the Raft River at any time, and a boat that would draw eight feet can enter the Raft River at high tide.

That was about 12 years ago that plaintiff made this selection, at the time they were surveying, and this land had been surveyed when he took up this selection. That the nearest settlement to this land is a settlement called Queets where there is a large cannery and store. That plaintiff has always been willing and anxious to go upon the allotment and live upon it as an allotment. That plaintiff is seeking this allotment for himself, to hold permanently, but that his small children he expects to take care of and support while under his care, if he is allowed to go upon this allotment. At this point counsel for plaintiff, this respondent, introduced the third paragraph of defendant's answer as going to prove the fact that the Government had excluded him from the land, which was admitted by the Court.

Testimony of Joe Pullen, for Plaintiff.

Joe Pullen, an Indian of the Quileute Tribe who has also made a selection, testified that the locality where Tommy Payne had made his selection was partly bottom land and fit for agricultural purposes in some place, but a little further in it is kind of heavy timber, pretty hard to clear, but not what you would call timber land, though there is some timber on it. That the soil is clay soil, and the portion where it is the most heavily timbered would be good for grazing or agriculture with the timber removed. That the land is not all bottom land but is brushy land. [33] The witness characterized a part of the land as "brushy," about one-third of the tract as fit for agriculture and the timbered area as containing some merchantable timber.

On cross-examination the witness testified that he had gone over the Raft River country, and also the Queets and Quinaielt River country, but did not know exactly the location of the land in question, though he had gone along a creek, Red River, and both sides of it were kind of level land; that he had been up the Raft River once, and had passed through the land between the Raft River and the Red River, but not further in. That nearly all the land going up the river is bottom land and one can tell that one-third of the 80 acres is bottom land, but further in is kind of heavy timber, as

(Testimony of Jack Ward.)

it is always that way in creeks, not big rivers; that witness thought he must have passed through that land if it is close to that red river.

Testimony of Jack Ward, for Plaintiff.

Jack Ward, also a member of the Quileute Tribe of Indians, testified he had known plaintiff all his life; that he had lived at Quileute, and that the testimony in regard to the fish being depleted in the ocean and the rivers in the neighborhood of the Quileute Reservation, and the number of people on that reservation, was true. That the witness had been in the locality of the land selected by Tommy Payne several times; that the land is the same as around the Queets country where the farmers live; that he would say pretty near one-half of that selection was good for agricultural land, and the other half toward the hill is timber, and if the timber were removed would be about the right kind of land for agriculture, and grazing. That he should judge about 30 acres of this selection is open-like and brushy, and the other fifty is where the timber lies. That he had been up in the Queets country which [34] is about six miles from the Raft river, the biggest part of which is inside the reservation, where the Indians have cleared their land and live on it to make a living there. In the Queets River there are about eight Indian families and right across the river there are over twenty white families. That one farmer living right across from one of the Indian farms

(Testimony of Jack Ward.)

has about 40 head of cattle and has cleared about sixty acres of his ranch, and the land in the Raft river territory, including the land Mr. Payne selected, is as good, and of the same character, as the land where the eight Indian families and twenty white families have cleared land.

That the Quinaielt Indians have lands upon that reservation, and that some of the Quileutes have been allotted, but a great majority of the Quileutes have been refused their allotments.

Not all of the land selected by Mr. Payne is suitable for agriculture now. Most of those lands in that valley were just like the one Mr. Payne selected, and now they have big farms out of it.

That the witness had been on Tommy Payne's selection a year ago this last fall (the fall of 1920), but did not remember how many times he had been upon it; that he had hunted through that part of the country; that he did not know the location of the land by the posts, but had been around that vicinity and over that Raft River. That there might be a few hemlocks besides spruce and cedar, but that he did not know about fir.

The evidence submitted on behalf of the Government is contained in a letter addressed to the Commissioner of Indian Affairs signed by Superintendent Eugene W. Hill of Taholay, Washington, and introduced in evidence as Defendant's Exhibit "A", which letter is as follows: [35]

Defendant's Exhibit "A".

"LOCATION.—This tract of land lies on Raft River and about two or two and one-half miles from the mouth of the River. A poor and very slightly used foot trail goes through the tract and is the only means of getting to this or any of the adjacent land. The nearest habitation of any sort is upon the Queets River, about 8 miles distant from the tract and is reached by going along the beach. There is no road of any sort between Raft River and the Queets. Raft River is about 11 miles from Taholah and is reached by going up the beach at low tides and crossing the bluffs on very poor trails which are almost impassable more than half of the year. Very small gas boats (30 feet or so in length) can enter Raft River at high tide and with a quiet sea but the river is too small and shallow to permit of large boats entering or of small boats entering at any but full tides."

"LAND.—About 30 acres of the land consists of level and fairly rich bottom which would, if cleared, make good farm land. The balance (50 acres) consists of rolly bench and side hill slope to the higher land back from the river, and would, if cleared, make grazing and possibly farm land. The land is all heavily timbered, however, and clearing such land would cost from $150 to $250 per acre, and situated as it is the land when cleared could probably scarce pay for the taxes."

"TIMBER.—The timber on the area consists of a mixed stand as shown by the cruise below, the

cedar predominating. As in the case of timber near the salt water it is not of the best quality, but it is all sound, of good quality (not best) and it is not at present deteriorating."

	NW¼	NW¼; SW¼ NW¼.	Totals	
Cedar	474000	272000	746000	board feet
Spruce	133000	81000	214000	" "
Fir (Amabalis)..	23000	42000	65000	" "
Hemlock	3000	10000	13000	" "
Cedar Bolts.....	500	580	1080	cords
Cedar Poles	5000	10000	15000	linear feet.

"VALUE.—(a) Land. On the same basis that we use in appraisals in this vicinity the land would be worth in the vicinity of $400.00. However, this is largely theoretical value, as, situated where it is, the land alone means very little and has whatever value is attached to it because of the timber. The land is of fairly good quality and as such has some value, but in the case of timber lands, it is generally the timber that is sold and the prices are based on the timber with the land thrown in. Where the land is of good quality it would increase the value of the tract. The land in this case, being as inaccessible as it is, would still have some value but it would be largely a paper value and a very poor sale value."

"(b) Timber. The timber on this tract would be worth about $3900.00, making the entire tract worth some $4300.00. [36]

The timber has an actual sale value and is both salable and marketable even though it is removed from any present scenes of logging or milling,

Timber being removed from present markets and railroads lowers the price of it but it still has ready sales and in the case of a tract such as this the timber really carries whatever value may be attached to the land."

"Regardless of whether the values placed on the land and timber on this tract are either somewhat high or low there is no question but that the value of the timber is greatly in excess of the value of the land either for agricultural or grazing purposes. The estimates shown above would indicate that the land value is approximately 10% that of the timber value and if anything it's a question of whether this additional 10% should not be credited to the timber as it is really the timber that makes this value possible."

"In this connection it can also be said that there are but a very few allotments (already made) on this reservation on which the timber value is not greatly in excess of any value that can be credited to the land, and generally in these few cases the factors that made for a low timber value would also serve to make the land of but very little value."

After the admission in evidence of the above letter, counsel for plaintiff expressed a desire to cross-examine Mr. Hill in reference to the report, in regard to the accessibility of the land, the character of the timber on it and the value of the timber claims in that locality and of the timber upon that land, but the Court admitted the same as a Government record, stating counsel for plain-

tiff could subpoena Mr. Hill as a witness to cross-examine him if he desired to do so.

At this point the following took place:

Mr. MOUNT.—I would be willing to stipulate, if counsel is willing to concede it, that there has not been any allotment made under the terms of the treaty with the Quileute and Quinaielt Indians, made July 1st, 1885, and no allotment made on the reservation until long after the passage of the Act of February 8th, 1887. Other than that I cannot see [37] that any additional witnesses would be of advantage, because we have in evidence practically everything that our witnesses would testify to, with this record, and statement that there were no allotments made under the treaty, and that allotments were not made until after the Act of Congress of 1887. That is substantially what we would prove were our witnesses present.

Mr. GRIFFIN.—I think that is very largely a question of law. The treaty gave these Indians certain rights and the allotment Act provides that where allotments are provided in the treaty and the amount provided for in the treaty, it gives the Indians a right to a greater amount than eighty acres, the treaty shall govern. However, this plaintiff is only, in this suit, demanding that he be allotted the eighty acres selected by him. The Government has taken the position for a long time that they would not allot to the Indians in excess of eighty acres in all the treaties where the provisions are substantially the same as they are here. Under the statute he is clearly entitled to eighty

acres and he is also entitled to eighty acres under the treaty, if no more.

The COURT.—And he has not got any?

Mr. GRIFFIN.—He has not got any.

The COURT.—And this, which Mr. Mount is asking you to concede, does not conflict with that.

Mr. GRIFFIN.—I am willing to concede that allotments were not made until after '87.

The COURT.—Whether it was made under the Treaty or under the Act, you claim that it is a proposition of law, and you are not conceding it, as a matter of fact?

Mr. GRIFFIN.—No. * * *" [38]

ARTHUR E. GRIFFIN, offered himself as a witness in reference to the amount of timber upon fair, good and extra good timber claims. Before allowing him to be sworn in, the Court questioned Mr. Griffin as follows:

The COURT.—Then you are conceding what he (Mr. Mount) asks except you are not conceding that the allotments that were made were made pursuant to the act of '87 to the exclusion of the treaty?

Mr. GRIFFIN.—Yes.

The COURT.—You are leaving that open as a question of law?

Mr. GRIFFIN.—Yes.

Testimony of Mr. Griffin, for Plaintiff.

Being duly sworn Mr. GRIFFIN testified that he had lived in the State and territory of Washington since the 15th of April, 1884; that during that time he had assisted in surveying a number

(Testimony of Mr. Griffin.)

of timber claims and assisted in cruising a number of timber claims; had been familiar with the amount of timber upon the timber claim by representing clients that have been buying, and had examined the abstracts of many claims which had been bought by his clients. That he had also been along the Pacific Coast south of the Makan reservation at Cape Flattery, and further on down to the Suez river and owned one timber claim near the Suez river. That he had also been down to the Quileute reservation and examined timber claims to some extent. That he had made many inquiries among timber men as to the amount of timber upon claims which were considered fair and good timber claims and exceptionally good timber claims.

Witness testified that in his judgment a timber claim of 160 acres which has less than four million feet, would be classed as a poor timber claim. A claim of five million feet to seven and a half million feet, would be considered a good timber claim, [39] referring to a 160-acre claim. Claims from seven and a half to fifteen million feet and above that are considered exceedingly good timber claims.

In regard to the amount of timber on this tract of land, the amount of timber is given in board feet and in cords for bolts. That on an average they consider a cord of bolts about equals a thousand feet board measure in lumber, which is the amount applied to the two claims, which would

(Testimony of Mr. Griffin.)

make this about a two million foot claim, for 160 acres. This Indian claims the right to that land because of the fact that he is an Indian and because the treaty gives him the right to it, and because the statute gives him the right to it. This eighty would be half of a claim as is generally considered by timber men in buying claims, 160 acres.

Witness also testified that land upon which cedar and spruce grow in the State of Washington is usually good agricultural land after the timber is removed.

Upon cross-examination the witness testified that if there was only one million feet of timber on the eighty in question he would classify it as agricultural land rather than a timber claim, and that it would be agricultural land regardless of whether the timber was on it or not.

In regard to his experience in cruising timber, the witness testified that in the early days he had been located at Enumclaw and assisted in surveying and subdividing several sections of land up there which Robert Wingate had purchased from the Northern Pacific; that at that time there was a big tract of country extending up the White River for miles and settlers were coming in at that time taking up claims from eighty acres on; that witness was interested in developing that country and on behalf of Mr. Cooper, agent of the Northern Pacific Railway Company, [40] assisted a num-

(Testimony of Mr. Griffin.)

ber of people to settle in there, went with them and found the corners of their ground where it was possible to find them and assisted them in locating their claims, also further north and east up the White River and Natches Pass. He never following timber cruising as a profession or as a business. That he assisted the Northern Pacific Engineers in locating the main line of the Northern Pacific Railway Company from about Coal Creek, which is a little east of Enumclaw, over the summit of the Cascade Mountains, and assisted in surveying the old switchback over the top of the mountains in 1885, which was location work.

Respectfully submitted,
ARTHUR E. GRIFFIN,
Attorney for Respondent. [41]

United States District Court, Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Approving Statement of Evidence.

I, Edward E. Cushman, Judge of the above-entitled Court, and the Judge before whom the

above case was tried, upon stipulation of plaintiff's counsel hereto attached, do hereby certify, the plaintiff and the defendant having been represented by their respective counsel in open Court, that the foregoing is a true and complete statement of all the evidence essential to the decision of the questions presented by the appeal of the defendant from the judgment entered herein against the defendant and in favor of the plaintiff; and I do hereby approve the same as the statement of the evidence in said matter for the purpose of said appeal, and do hereby order that the same become a part of the record for the purpose of said appeal, and order further that all the original exhibits be transmitted to the Appellate Court.

Done in Court this 15th day of July, A. D. 1922.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 15, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [42]

The evidence submitted on behalf of the Government is contained in a letter addressed to the Commissioner of Indian Affairs and signed by Superintendent Eugene W. Hill of Taholah, Washington, and marked as Government's Exhibit "A". The letter is as follows:

Government's Exhibit "A".

"LOCATION.—This tract of land lies on Raft River and about two or two and one-half miles from

the mouth of the River. A poor and very slightly used foot trail goes through the tract and is the only means of getting to this or any of the adjacent land. The nearest habitation of any sort is up on the Queets River, about 8 miles distant from the tract and is reached by going along the beach. There is no road of any sort between Raft River and the Queets. Raft River is about 11 miles from Taholah and is reached by going up the beach at low tides and crossing the bluffs on very poor trails which are almost impassable more than half of the year. Very small gas boats (30 feet or so in length) can enter Raft River at high tide and with a quiet sea but the river is too small and shallow to permit of large boats entering or of small boats entering at any but full tides.

"LAND.—About 30 acres of the land consists of level and fairly rich bottom which would, if cleared, make good farm land. The balance (50 acres) consists of rolly bench and side hill slope to the higher land back from the river, and would, if cleared, make grazing and possibly farm land. The land is all heavily timbered, however, and clearing such land would cost from $150 to $250 per acre, and situated as it is the land when cleared could probably scarce pay for the taxes.

"TIMBER.—The timber on the area consists of a mixed stand as shown by the cruise below, the cedar predominating. As is the case of timber near the salt water it is not of the best quality, but it is all sound, of good quality (not best) and is not at present deteriorating.

	NW¼	NW¼	SW¼	NW¼.	Totals	
Cedar	474000		272000	746000	board	feet
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"VALUE.—(a) Land. On the same basis that we use in appraisals in this vicinity the land would be worth in the vicinity of $400.00. However this is largely a theoretical value as, situated where it is, the land alone means very little and has whatever value is attached to it because of the timber. The land is of fairly good quality and as such has some value, but in the case of timber lands, it is generally the timber that is sold and the prices are based on the [43] timber with the land thrown in. Where the land is of good quality it would increase the value of the tract. The land in this case, being as inaccessible as it is, would still have some value but it would be largely a paper value and a very poor sale value.

"(b) Timber. The timber on this tract would be worth about $3900.00, making the entire tract worth some $4300. The timber has an actual sale value and is both salable and marketable even though it is removed from any present scenes of logging or milling. Timber being removed from present markets and railroads lowers the price of it but it still has ready sales and in the case of a tract such as this the timber really carries whatever value may be attached to the land.

"Regardless of whether the values placed on the land and timber on this tract are either somewhat high or low there is no question but that the value of the timber is greatly in excess of the value of the land either for agricultural or grazing purposes. The estimates shown above would indicate that the land value is approximately 10% that of the timber value and if anything it's a question whether this additional 10% should not be credited to the timber as it is really the timber that makes this value possible.

"In this connection it can also be said that there are but a very few allotments (already made) on this reservation on which the timber value is not greatly in excess of any value that can be credited to the land, and generally in these few cases the factors that made for a low timber value would also serve to make the land of but very little value." [44]

United States District Court, Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Extending February Term.

This matter coming on regularly for hearing this first day of July, 1922, upon the motion of W. W.

Mount, attorney for the above-named defendant, and the Court being fully advised,

IT IS HEREBY ORDERED that the February Term, 1922, of the above-entitled Court be held open and continued as to the above-entitled case for a period of thirty days from this date.

Done in open Court this first day of July 1922.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 1, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [45]

United States District Court, Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Praecipe for Transcript of Record.

To the Clerk of the above Court:

Kindly prepare, certify and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a typewritten transcript of the record on appeal in the above-entitled cause, to wit:

1. Bill of complaint.
2. Answer.
3. Demurrer to answer.
4. Memorandum decision on Demurrer.
5. Memorandum decision on the Merits.
6. Decree.
7. Findings of fact and conclusions of Law.
8. Defendant's Exceptions.
9. Petition for appeal.
10. Assignment of errors.
11. Order allowing appeal.
12. Order extending time to March 20, 1922, to file bill of exceptions. [46]
13. Order extending time to May 19th, 1922, to file bill of exceptions.
14. Plaintiff's proposed statement of evidence.
15. Order approving statement of evidence.
16. Defendant's Exhibit "A".
17. Citation.
18. Praecipe of defendant for record on appeal.
19. Order extending February Term.
20. Order extending time for filing record in Circuit Court of Appeals.

Dated at Tacoma, Washington, June 10 1922.

THOS. P. REVELLE,
United States Attorney,
W. W. MOUNT,
Assistant United States Attorney,
Attorneys for Defendant.

Service in the foregoing praecipe is hereby admitted this 13th day of July, 1922.

GRIFFIN & GRIFFIN,
Attorneys for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 1, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy Clerk. [47]

United States of America,
Western District of Washington,—ss.

Certificate of Clerk U. S. District Court, to Transcript of Record.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing pages numbered from one to fifty inclusive, contain a true and correct transcript of the record on appeal in the case of Tommy Payne, Plaintiff, versus The United States of America, Defendant, No. 111–E, in said District Court, as required by praecipe of Thos P. Revelle, United States District Attorney and W. W. Mount, Assistant United States District Attorney, attorneys for the United States, appellant herein, filed and shown herein as the originals appear and are of record in my office in said district at Tacoma.

I further certify and return that I hereto attach and transmit the original citation, the original order extending time in which to file the record of appeal herein with the Circuit Court of Appeals, and that I am also transmitting herewith, the original Exhibits filed in said cause, said exhibits being as follows:

Defendant's Exhibit "A."

Attest my hand and the seal of said District Court at Tacoma, in said District, this 21st day of June, A. D. 1922.

[Seal] F. M. HARSHBERGER,
Clerk.
By Alice Huggins,
Deputy Clerk. [48]

United States District Court, Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Citation on Appeal.

United States of America, to Tommy Payne and Griffin & Griffin, His Attorneys, GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, California, thirty days from and after the days this citation bears date, pursuant to an appeal allowed and filed in the Clerk's Office of the United States District Court for the Western District of Washington, Southern Division, wherein the United States of America is the appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as

in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court of the Western District of Washington, Southern Division, this 16th day of May, A. D. 1922.

EDWARD E. CUSHMAN,
United States District Judge. [49]

United States District Court, Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Extending Time to and Including August 1, 1922, to File Record and Docket Cause.

BE IT REMEMBERED that this matter came on duly and regularly before this Court, and it appearing to the Court that good cause has been shown why the time for filing record on appeal with the Circuit Court of Appeals should be extended;

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the date and time for filing the record on appeal herein with the Circuit Court of Appeals for the Ninth Circuit, at San

Francisco, California, be, and the same is hereby extended to and including the 1st day of August, 1922.

Done in open court this 20th day of July, 1922.

EDWARD E. CUSHMAN,
Judge U. S. District Court.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 20, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [50]

[Endorsed]: No. 3897. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Tommy Payne, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed July 24, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Printed Transcript of Record. Filed August 21, 1922, F. D. Monckton, clerk.

58 [Title omitted.]

Order of submission.

(Filed Sept. 20, 1922.)

Ordered appeal in the above-entitled cause argued by Mr. Arthur E. Griffin, counsel for the appellee, Mr. John A. Frater, assistant United States attorney and counsel for the appellant, submitting cause on brief on file, and submitted to the court for consideration and decision.

59 [Title omitted.]

Order filing opinion, Dec. 4, 1922.

By direction of the Honorable William B. Gilbert and William H. Hunt, circuit judges, and the Honorable Frank H. Rudkin, district judge, before whom the causes were heard, ordered that the typewritten opinion this day rendered by this court in each of the following-entitled causes be forthwith filed by the clerk, and that a judgment or decree be filed and recorded in the minutes of this court in each of the causes in accordance with the opinion filed therein: * * *

[Title omitted.]

60 *Opinion.*

(Filed Dec. 4, 1922.)

[Title omitted.]

Appeal from the United States District Court for the Western District of Washington, Southern Division.

Before Gilbert and Hunt, circuit judges, and Rudkin, district judge:

HUNT, Circuit Judge:

From a decree directing the agents of the United States to issue to Tommy Payne, an Indian of the Quileute Tribe, a certificate of allotment to a certain tract of land in the Quinaielt Reservation, Washington, the United States appeals. The present suit was brought under the act of 1894 (28 St., p. 305), as amended by act of February 6, 1901 (31 St. 760).

Pursuant to a treaty made with the Quinaielt and other Indians, certain lands were reserved to be surveyed and set apart for the "exclusive use" of the Indians. The treaty was made July 1, 1855, and concluded January 25, 1856, and was ratified March 8, 1859. (12 St. 971; 36 St. 1345.)

In February, 1887 (24 St. 388), Congress passed an allot-
61 ment act, which was amended by act of February 28, 1891, (ch. 383, sec. 1), and act of June 25, 1910 (ch. 431, sec. 17), providing that in all cases where any tribe of Indians has been located upon any reservation created for their use by treaty, stipulation, act of Congress, or Executive order, the President shall be authorized to cause the same to be surveyed or resurveyed "whenever in his opinion any reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interests, not to exceed 80 acres of agricultural, or 160 acres of grazing land to any one Indian."

About 1911, after survey made in 1910, through an allotting agent for the United States, Payne made a selection of the land here involved, and his name was recorded, but he has been excluded from the land. The land selected by Payne is in part heavily timbered and in part bottom land with clay soil, but there is evidence that the value of the timber is greater than the value of the land for agriculture or grazing. Because of such value conditions the Government pleads that the land selected is not subject to allotment and that therefore allotment has been refused, and Payne has been rightfully excluded.

The question before us is whether, under the cited act of Congress of 1887, the land Payne selected should be excluded from allotment because it is in part heavily timbered and until cleared is doubtless more valuable for timber than for agriculture or grazing.

62 The provisions of the treaty contained no restriction as to the character of the land to be located, and we do not regard the provisions of the act of 1887, supra, as so limiting the authority of the President that he may not order allotment of lands included in the reservation made under the treaty provisions and surveyed. The discretion of the President having been exercised in relation to survey, as contemplated by the treaty, the provisions of Article V of the treaty, heretofore referred to, indicate that the makers of the treaty knew that clearing of the lands was as necessary as breaking up for cultivation. Furthermore, judicial knowledge will be taken of the fact that when the treaty was made, the reservation was in a timbered area of the country. The allotment statute of 1887 was general in character and contemplated that lands held by the United States under Indian treaty cessions might be surveyed or resurveyed when, in the opinion of the President, the lands could be advantageously used for farming or grazing purposes by the Indians. Whether the lands could be advantageously used for agriculture or grazing by the Indians was left to the opinion of the President; but when the opinion that such advantageous use might be made was formed, then allotment is to be made, not necessarily of any given quantity, but only in such areas as in the opinion of

the President may be for the best interests of the Indians, not to exceed 80 acres for agricultural, or 160 acres for grazing purposes to any one Indian. But, where survey has been made and selection has been made, the authority to allot can not be made dependent upon the comparative value of the land for timber or agriculture or grazing purposes. Leecy vs. United States, 190 Fed. 289.

63 The construction outlined seems specially fair in the case of the Quileute Indians, who gave up a large area under assurances that they would have a reservation in the heavily-timbered wilderness selected by them and the other makers of the treaty.

Our conclusion is that the allotment act of 1887 does not prevent the carrying out of the true intent of the treaty provisions, and that Payne is entitled to the land selected.

Decree affirmed.

[File endorsement omitted.]

64 [Title omitted.]

Decree.

(Filed Dec. 4, 1922.)

Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in this cause be, and hereby is, affirmed.

[File endorsement omitted.]

65 [Title omitted.]

Petition for stay of mandate.

(Filed Jan. 2, 1923.)

To the Honorable Judges of the Above-Entitled Court:

Comes now Thos. P. Revelle and W. W. Mount, attorneys for the appellant in the above-entitled case and respectfully petition this honorable court for an order staying the execution of the mandate on the opinion filed December 4th, 1922, for a period of thirty days from and after the date of expiration of the time for filing a petition for rehearing in the above cause.

This petition is made pursuant to telegraphic instructions received from the Attorney General of the United States asking additional time for the purpose of determining the advisability of ap-

pealing the above-entitled case to the Supreme Court of the United States.

Respectfully submitted.

THOS. P. REVELLE,
United States Attorney,
Western District of Washington.
W. W. MOUNT,
Assistant United States Attorney,
Western District of Washington.

Dated San Francisco, Cal., January 2, 1923.

So ordered:

W. H. HUNT,
United States Circuit Judge.

[File endorsement omitted.]

66 [Title omitted.]

Order staying mandate.

(Filed February 1, 1923.)

This matter coming on regularly to be heard on this 1st day of February, 1923, on the petition of Thos. P. Revelle and W. W. Mount, attorneys for the appellant in the above-entitled cause, requesting an additional stay of the execution of the mandate on the opinion rendered by this court and filed with the clerk on December 4th, 1922, and the court being fully advised in the premises,

It is ordered that the mandate in the above-entitled cause be stayed until the first day of March, 1923.

Dated this 1st day of February, 1923.

WM. W. MORROW,
United States Circuit Judge.

[File endorsement omitted.]

67 [Title omitted.]

Notice of appeal.

(Filed February 2, 1923.)

The above-named defendant and appellant, conceiving itself aggrieved by the decision, judgment, and decree entered in the above-entitled proceeding by the United States Circuit Court of Appeals for the Ninth Circuit, does hereby appeal from said judgment and decree to the Supreme Court of the United States, and it prays that this, its appeal, may be allowed and that a transcript of the record

and proceedings and papers upon which said judgment and decree were made, duly authenticated, may be sent to the Supreme Court of the United States.

H. H. DAUGHERTY,
Attorney General,
THOS. P. REVELLE,
United States Attorney,
Western District of Washington,
Attorneys for Defendant, Appellant.

[File endorsement omitted.]

68 [Title omitted.]

Assignments of error.

(Filed Feb. 2, 1923.)

Comes now the United States of America, defendant, appellant, by and through its attorneys, H. H. Daugherty and Thos. P. Revelle, and make and file this their assignments of error and upon which it relies as supporting its appeal from the judgment and decree entered on the fourth day of December, 1922, in the Circuit Court of Appeals for the Ninth Circuit of the United States, and under which assignments of error said appellant seeks the reversal of the decision, judgment, and decree of said Circuit Court:

I.

That the Circuit Court erred in sustaining the District Court's error in sustaining the plaintiff's demurrer to that portion of the defendant's answer alleging that the land mentioned and described in the plaintiff's petition was not such land as is or would be available for agricultural or grazing purposes, but, on the contrary, is heavily timbered, and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes.

II.

That the Circuit Court erred in sustaining the District Court's error in finding that the land selected for allotment by the plaintiff, Tommy Payne, was subject to selection and allotment under the laws of the United States and that the plaintiff is lawfully entitled to have such land allotted to him.

69 III.

That the Circuit Court erred in sustaining the District Court's error in finding that the officers and agents of the United States of America have wrongfully failed, neglected, and refused to allot the said land to the plaintiff or to issue to the plaintiff any trust or fee patent therefor.

IV.

That the Circuit Court erred in sustaining the District Court's error in adjudging that the plaintiff was entitled to a decree adjudging and decreeing that the said plaintiff, Tommy Payne, is entitled to the land selected for his allotment and that the plaintiff is entitled to have said land allotted to him by the defendant, its officers and agents.

V.

That the Circuit Court erred in sustaining the District Court's error in concluding that the plaintiff is entitled to the immediate possession of said lands and is entitled to go upon the same with himself and his family, and to build, clear, and improve said lands, and to use the same and all parts thereof for his home for himself and said family, and is entitled to all the rights guaranteed to said plaintiff and the Indians of his said tribe by the treaty made and entered into by the United States and said Quilleute Tribe and Band of Indians.

VI.

That the Circuit Court erred in sustaining the District Court's error in concluding that the plaintiff is entitled to a decree estopping the defendant, its officers and agents from hereafter interfering with the plaintiff in his rights to the possession of said lands and his right to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiff is not entitled to go upon, clear, improve, and build upon said land.

H. H. DAUGHERTY,
Attorney General,
THOS. P. REVELLE,
United States Attorney,
Western District of Washington,
Attorneys for Defendant, Appellant.

70 Due acknowledgment of service of a copy of within assignments of error is admitted this 31st day of January, 1923.

ARTHUR E. GRIFFIN,
Attorney for Plaintiff-Appellee.

[File endorsement omitted.]

71 [Title omitted.]

Order allowing appeal.

(Filed February 2, 1923.)

Be it remembered that this matter came on duly for hearing on the petition of the United States, through its attorneys, H. H. Daugherty and Thos. P. Revelle, for the allowance of its petition in appeal

in the foregoing-entitled cause from the decision of this court made and entered on the 4th day of December, 1922, and the said appeal being from said decision and formal decree to the Supreme Court of the United States, and this court being fully advised in the premises.

It is hereby ordered that the said appeal be allowed as prayed for, and the clerk of this court is hereby directed to formulate a true copy of the transcript of the records and proceedings to the extent necessary to properly present said appeal, together with exhibits and other matters of record and the memorandum decision and formal decree of this court, all duly authenticated, and send same to the said Supreme Court of the United States.

Done in open court this 2d day of February, 1923.

WM. W. MORROW,
U. S. Circuit Judge.

[File endorsement omitted.]

72 [Title omitted.]

Praecipe for transcript of record.

(Filed Feb. 12, 1923.)

To the Clerk of the Above Court:

Kindly prepare, certify, and transmit to the clerk of the Supreme Court of the United States, at Washington, D. C., a typewritten transcript of the record on appeal in the above-entitled cause, to wit:

1. Bill of complaint.
2. Answer.
3. Demurrer to answer.
4. Memorandum decision on demurrer.
5. Memorandum decision on the merits.
6. Decree.
7. Findings of fact and conclusions of law.
8. Defendant's exceptions.
9. Petition for appeal.
10. Assignment of errors.
11. Order allowing appeal.
12. Order extending time to March 20, 1922, to file bill of exceptions.
13. Order extending time to May 19th, 1922, to file bill of exceptions.
14. Plaintiff's proposed statement of evidence.
15. Order approving statement of evidence.
16. Defendant's Exhibit "A."
17. Citation.

73 18. Praecipe of defendant for record on appeal.

19. Order extending February term.

20. Order extending time for filing record in Circuit Court of Appeals.
21. Notice of appeal.
22. Assignment of errors.
23. Order allowing appeal.
24. Order staying mandate.
25. Order staying mandate.
26. Praecipe of defendant, appellant, for record on appeal.

Dated at Tacoma, Washington, January 31st, 1923.

H. H. DAUGHERTY,
Attorney General,
THOS. P. REVELLE,
United States Attorney,
Western District of Washington,
Attorneys for Defendant, Appellant.

Copy of the within praecipe received February 5, 1923.

ARTHUR E. GRIFFIN,
Attorney for Plaintiff, Appellee.

[File endorsement omitted.]

74 [Title omitted.]

Certificate of clerk.

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-three (73) pages, numbered from and including 1 to and including 73, to be a full, true, and correct copy of the record under rule 8 of the Supreme Court of the United States, in the above-entitled cause, including the assignment of errors on appeal to the Supreme Court of the United States and of all proceedings had, and of all papers, including the opinion filed in the said Circuit Court of Appeals in the above-entitled case, including defendant's Exhibit "A," filed July 24, 1922, made pursuant to praecipe of counsel for the appellant, filed February 12, 1923, as the originals thereof remain on file and appear of record in my office, and that the same constitutes the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 15th day of February, A. D. 1923.

[SEAL.]

F. D. MONCKTON,
Clerk.
By PAUL P. O'BRIEN,
Deputy Clerk.

75 [Title omitted.]

Citation on appeal.

(Filed Feb. 12, 1923.)

United States of America, to Tommy Payne and Griffin & Griffin, his attorneys, Greetings:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., on the 2d day of April, 1923, pursuant to an appeal, filed in the clerk's office of the Circuit Court of Appeals of the United States for the Ninth Circuit, wherein the United States is defendant, appellant, and Tommy Payne is plaintiff, appellee, to show cause, if any there be, why the judgment and decree in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness, the Hon. William W. Morrow, United States Circuit Judge, this 2d day of February, in the year of our Lord one thousand nine hundred twenty-three.

WM. W. MORROW,
U. S. Circuit Judge.

76 Service of a copy of within citation on appeal admitted Feb. 5, 1923.

ARTHUR E. GRIFFIN,
Attorney for Plaintiff, Appellee.

[File endorsement omitted.]

[Indorsed on cover:] File No. 29445. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 240. The United States of America, Appellant, *vs.* Tommy Payne. Filed March 6th, 1923. File No. 29445.

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